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## Behaviour that underpins non-pathological criminal incapacity and automatism: Toward clarity for psychiatric testimony

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## ABSTRACT

Psychiatric expert testimony is challenging in cases of violence when the accused person submits a defence that he or she was so overwhelmed by emotions triggered by an upsetting event that his or her violent behaviour was an uncontrollable consequence of the emotions. This defence is usually presented in terms of an automatism particularly not attributed to a mental disorder. Clouding testimony in these cases is the various definitions of both automatism and mental disorder—definitions by which the jurisprudential distinction is made between a sane and an insane automatism, or pathological and non-pathological incapacity (NPCI).

To avert testimony that is tainted from the very beginning by the lack of agreed definitions, this article proposes that psychiatrists focus in their assessment and testimony on particularly the behaviour as being distinct from the jurisprudential concerns whether that behaviour constitutes an automatism and whether it is (not) attributed to a mental disorder. This focus on the behaviour affords clarity by which the properties of the behaviour may be examined theoretically and clinically in terms of behaviour therapy, specifying accordingly its antecedents, consequences, topography, intensity, latency, duration, frequency, and quality.

So informed, the behaviour that underpins NPCI and automatism is described here as emotionally triggered involuntary violent behaviour about which testimony may be given distinct from whether the behaviour is (not) causally attributed to a mental disorder, and from jurisprudential concerns with accountability.

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## 1. Introduction

Psychiatric expert testimony is challenging in cases of violent crimes, usually murder, for which the accused person submits a defence to the effect that he or she was so overwhelmed by emotions triggered by an upsetting event that a court of law should not find him or her guilty of an offence, because the behaviour was in some way or another involuntary owing to the uncontrollable effects of the emotions. Sometimes, these cases are referred to as crimes of passion. This defence goes hand in hand with the insistence that there had been no mental disorder at the time of the alleged offence.

This article is about testimony on the behaviour that is relevant to a defence generally known as that of “psychological blow automatism” (Bourget & Whitehurst, 2004; Campbell, 1980–1981; Livingston &

Verdun-Jones, 2002–2003; Samuels, O'Driscoll, & Allnutt, 2007; Wells & Wilson, 2004). It highlights the apparently unresolvable divergences in definitions of both automatism and mental disorder in these cases—definitions by which the jurisprudential distinction is made between a sane and an insane automatism, or pathological and non-pathological incapacity (NPCI).

To avert confusion caused by the divergent definitions, this article proposes that psychiatrists focus principally in their assessment and testimony on particularly the behaviour as being distinct from the jurisprudential concerns whether that behaviour constitutes an automatism and whether it is attributed to a mental disorder. We argue that this focus, informed by behavioural theory, affords potentially crucial testimony that is not tainted from the very beginning by the lack of universally agreed definitions for both an automatism and a mental disorder. Furthermore, a clinical assessment focussed on the behaviour is suitably within the scope of psychiatric expertise, whereas it is for courts of law to decide whether the behaviour counts as a defence in terms of legal requirements for (if still important) an automatism, or other jurisprudential considerations.

Although arguably also relevant to other jurisdictions, this article is mainly based on the challenges South African psychiatrists experience when evaluating, reporting, and giving expert testimony in these

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cases. Hence, the South African jurisprudential provisions are described first, before highlighting different takes, affected by the jurisprudential concern with accountability, on what constitutes an automatism.

## 2. The “insanity” defence in South Africa and non-pathological criminal incapacity (NPCI)

Criminal courts in South Africa rely on psychiatric testimony for purposes of sections 78 and 79 of the Criminal Procedure Act No. 51 of 1977, as amended<sup>2</sup> (which will be referred to as the Criminal Procedure Act). These sections address whether the accused person was lacking in an appreciation of the wrongfulness of his or her behaviour at the time of the offence, or whether he or she could not act in accordance with an appreciation of wrongfulness. By this testimony, the court may find the accused not accountable and hence not guilty. Whether the accused poses a threat to others has no bearing hereto (contra *R v Luedcke*, 2008).<sup>3</sup>

The most commonly used Section 78(5)(a)(b) makes provision for lack of capacity owing to specifically “a mental illness or mental defect” that rendered an accused incapable of “acting in accordance with an appreciation of the wrongfulness of his or her act or omission”. The less commonly used Section 78(5)(c) makes provision for lack of criminal capacity not caused by a mental illness or mental defect but “for any other reason”. Whether rendered incapable by “a mental illness or mental defect” or “any other reason” has a major jurisprudential implication. The Criminal Procedure Act stipulates that when a court finds criminal incapacity caused by a mental illness or defect, the court must find the accused not guilty and has the option to order that the accused be detained under appropriate circumstances (usually a psychiatric hospital), but when an accused is found not guilty on grounds of incapacity owing to “any other reason” he or she is not only fully acquitted but also released back into society without any legal consequence. This pertains irrespective of the seriousness of a charge (*Snyman*, 2008: 56–57).

Relevant to Section 78(5)(c) is a South African legal term called non-pathological criminal incapacity (NPCI). This phrase was coined in the Supreme Court of Appeal in the case of *S v Laubscher* by Joubert JA (Joubert Justice of Appeal). By creating the term, NPCI, Joubert JA wanted to distinguish between a defence of incapacity not attributed to mental illness or immature age (*Snyman*, 2008: 162–169). The latter is also called a “sane automatism” (*Snyman*, 2008: 56) that is triggered by intense emotional distress. Other phrases that have been used in South African courts by mental health professionals and lawyers alike are “emotional storm” and “acute catathymic crisis”, “emotional flooding of the mind”,<sup>4</sup> “non-pathological automatism” and “psycho-genic automatism”.<sup>5</sup> All of these phrases, refer to a defence that may elsewhere be better known as that of a “psychological blow automatism” (*Bourget & Whitehurst*, 2004; *Campbell*, 1980–1981; *Livingston & Verdun-Jones*, 2002–2003; *Samuels et al.*, 2007; *Wells & Wilson*, 2004).

The term NPCI was intended to give clarity on matters regarding criminal incapacity not attributed to a mental illness or defect. Instead it caused confusion that was reflected in High Court decisions and academic writing. Navsa JA of the Supreme Court of Appeal described and criticised this state of affairs in *S v Eadie*.<sup>7</sup> Perturbed by the “misapplication” of decisions by the Supreme Court of Appeal, Navsa JA said, “The time has come to face up to the fact that in some instances our courts,

in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with the approach of the decisions of this Court [the SCA].”<sup>8</sup> He then clarified NPCI by insisting that it should be understood as an automatism.<sup>9</sup> However, he did not define an automatism, nor was it defined in the case of *S v Wiid* for which the defence of NPCI turned out to be successful.<sup>10</sup> Several expert witnesses have since testified inconsistently on what an automatism would be.<sup>11</sup>

## 3. Inconclusive state of affairs on what constitutes an automatism

A number of authors have described the inconclusive state of affairs in their review of definitions for automatisms (see for example *Fenwick*, 1990; *Arboleda-Flórez*, 2002; *Yeo*, 2002; *Coles*, 2000; *McLeod*, *Byrne*, & *Aitken*, 2004, and *Campbell*, 1980–1981). *Arboleda-Flórez* wrote that, “Automatism in law, therefore, is fraught with deep social and political implications, let alone scientific controversies about its existence outside of a narrow range of neurological and psychiatric conditions” (*Arboleda-Flórez*, 2002). In forensic psychiatry the confusion is expressed for example by *Fenwick* (1990), who writes “Where the professions [referring to the legal and medical professions] differ is on what constitutes automatism and what constitutes unconsciousness, and this remains a point of conflict”.

Adding to these reviews in describing the inconclusive state of affairs, we compare four well-established psychiatric definitions of automatism, namely those of *Briscoe et al.* (1993:56–59); *Simon* (2005: 3969–3987), *Kaliski*,<sup>12</sup> and *Sadock* (2009, p 921). This serves the purpose to highlight the divergences as well as articulate the behaviour common to these definitions, that is, the behaviour that underpins automatism.

In summary, these four definitions of automatism make reference to behaviour that is done while consciousness is impaired; behaviour done without full awareness; behaviour about which one has no knowledge; behaviour that is not willed, planned, purposeful, that is not produced intentionally, and for which cognitive functions are absent.

Unconscious behaviour is a central requirement for behaviour to be considered an automatism according to *Simon* (2005: 3969–3987) and *Briscoe et al.* (1993: 56–59), but not so in the descriptions of *Kaliski* (2006: 107–108) and *Sadock* (2009, p. 921). The issue on what is meant by “unconscious” was evident during the trial of the Canadian case *R v Stone*<sup>13</sup> where “unconsciousness” meant “flat out on the floor” to a psychiatrist,<sup>14</sup> but for the lawyers it meant “not knowing what one is doing”.<sup>15</sup> In some cases unconscious necessarily means impaired consciousness, such as is found during sleepwalking, concussion, and an epileptic seizure (*Briscoe et al.*, 1993: 56–59; *Bazil and Pedley* (2010); *Bratty v Attorney General of Northern Ireland*, 1961;<sup>16</sup> *R v K*, 1970<sup>17</sup>). In other cases unconscious does not necessarily mean impaired consciousness, but may also involve dissociative states (*Fenwick*, 1990; *Harding*, 1993: 135; *Bourget & Whitehurst*, 2004; *R v Stone*<sup>18</sup>).

<sup>8</sup> *S v Eadie* supra at paragraph 61.

<sup>9</sup> *S v Eadie* supra at paragraph 70.

<sup>10</sup> *S v Wiid* 1990 (1) SACR 561 (A).

<sup>11</sup> For *Kaliski*’s description of automatism see *S v Eadie* supra at paragraph 14. Also see *S v Potgieter* (1) SACR (A) 61 1994, pg. 84–85, and *Kaliski*, 2006:107–108.

<sup>12</sup> See footnote 11.

<sup>13</sup> *R v Stone*. Judgments of the Supreme Court of Canada. *R v Stone* [1999] 2 S.C.R. 290. Retrieved Jan. 22, 2015 from <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1705/index.do>

<sup>14</sup> *R v Stone* supra at paragraph 32.

<sup>15</sup> *R v Stone* supra at paragraph 32.

<sup>16</sup> *Bratty v Attorney General of Northern Ireland* [1961] UKHL 3 (03 October 1961). BALII. The whole case needs to be studied, but see especially Lord Denning’s remarks p. 7–11. Retrieved March 14, 2012 from <http://www.bailii.org/uk/cases/UKHL/1961/3.html>

<sup>17</sup> *R v K Ontario High Court of Justice*. In: *R. v. Stone* supra at paragraph 31.

<sup>18</sup> *R v Stone* supra. The whole verdict is applicable, but see for example p. 44, 109–110, 115.

<sup>2</sup> Criminal Procedures Act, No. 51 of 1977, retrieved May 04, 2015 from <http://www.justice.gov.za/legislation/acts/1977-051>.

<sup>3</sup> *R. v. Luedcke*, 2008 ONCA 716 (CanLII). Retrieved on 2015-05-13 from <http://www.canlii.org/en/on/onca/doc/2008/2008onca716/2008onca716.html>.

<sup>4</sup> See for example *S v Nursingh* (2) SACR (D) 331 (1995).

<sup>5</sup> See for example *S v Smith* (1) SACR (A) 130 (1990).

<sup>6</sup> See for example *S v Henry* (1) SACR (SCA) 13 (1999). Retrieved on 2015-05-13 from <http://www.saflii.org/za/cases/ZASCA/1998/109.html>.

<sup>7</sup> *S v Eadie* 2002 (3) SA 719 (SCA) at paragraphs 52–61. Retrieved May 05, 2015 from <http://www.saflii.org/za/cases/ZASCA/2002/24.html>.

By unconsciousness, *Briscoe et al.* (1993: 56–59) mean mental obfuscation. For Simon unconscious may include mental obfuscation, but it is not clear that mental obfuscation is a requirement, because *Simon* (2005: 3986) allows for “dissociation without full awareness”. It is not clear whether that means partial awareness; whether dissociation without full awareness means being in a dissociative daze as may happen after a severe traumatic experience, or whether it includes the states of having a clear sensorium as found during some of dissociative states of dissociative identity disorder. Most descriptions of dissociative states describes consciousness as being intact (in the sense that there is no clouding of consciousness—see for example dissociative identity disorder (*American Psychiatric Association*, 2013: 292–294)), although alterations in consciousness may occur (for example in trance states) (*During, Elahi, Taieb, Moro, & Baubet*, 2011).

For both Kaliski and Sadock, unconsciousness is not a requirement. For Kaliski<sup>19</sup> it is instead about loss of control over behaviour, stated as “...where one’s cognitive functions are absent and consequently one’s actions are unplanned and undirected”. For *Sadock* (2009: 921) it is about “...activity carried out without conscious knowledge...”. The problem is that not having knowledge of one’s behaviour does not mean the behaviour was done during mental obfuscation, because the behaviour could also have been done with a clear sensorium during a dissociative state. Not having conscious knowledge of one’s behaviour, moreover, does not mean it was involuntary. For example, when the behaviour is forgotten for some reason, then that does not say anything about whether the behaviour was involuntary. The Sadock definition of automatism thus seems over-inclusive.

Yeo also made a call to disregard consciousness altogether in considerations of automatism (*Yeo*, 2001, 2002), since the automatisms of dissociative states, which are sometimes characterised by altered states of consciousness (like some meditative and hypnosis states) (*Van der Hart & Dorahy*, 2009), are not characterised by impaired consciousness. Moreover, neurological automatisms may occur while consciousness and memory are intact. A good example is simple partial seizures, perhaps especially the sometimes bizarre frontal lobe seizures (*Moore & Puri*, 2012: 287–289). Another good example is the alien hand (also called the anarchic hand), even if less relevant in a forensic context. In the alien hand an upper limb performs complex and seemingly purposeful movements that, to the distress of a patient, are automatic—that is, it behaves in the absence of a person’s volition to do so (*Moore & Puri*, 2012: 177–179).

Further to the issue of (un)consciousness, descriptions of automatism given by Simon and Briscoe et al. as well as by Kaliski contain reference to another potentially confusing issue in that they require the behaviour of automatism not to be goal directed (*Briscoe et al.*, 1993: 56–59; *Kaliski*, 2006: 93–112; *Simon*, 2005: 3969–3987). The problem is that there are automatisms with behaviour that may be, or may at least seem to be goal directed. Examples are seen in complex partial seizures (*Moore & Puri*, 2012: 177–179, 287–289) and dissociative behaviour (presuming it would constitute an automatism) in dissociative identity disorder (*American Psychiatric Association*, 2013: 291–294). *Simon* (2005: 3969–3987), furthermore, explicitly brings the issue of will into his description of automatism by writing that an automatism is done without will. By an absence of will, it is meant that behaviour happens that the person does not will into its happening. The issue of will is not explicitly raised by *Briscoe et al.* (1993: 56–59); *Sadock* (2009 p. 921) or *Kaliski*.<sup>20</sup>

Instead, *Briscoe et al.* (1993: 56–59) require an absence of planning, while *Kaliski*<sup>21</sup> requires an absence of cognitive functions. An absence of planning and cognitive functions may imply an absence of will, but that may not necessarily be the case. For example, someone with severe degree of dementia may in absence of relevant cognitive functions switch

on a light rather automatically without planning, driven by the still present will to see better. One can add further clinical examples that challenge these descriptions of automatism. Consider tics, chorea, and hemiballism for example—all of them occur with consciousness being intact. Some of the definitions above would include these as automatisms, yet whether these would constitute automatisms is arguable.

### 3.1. Jurisprudential concern with accountability permeates legal judgement on automatisms

The interests of good jurisprudence to determine whether the accused is responsible, case specific difficulties, and legal procedures have affected, if not blurred, the notion of automatism and related concepts.<sup>22</sup> Nonetheless, South African courts of law accept the notion that one can, even if rarely, be so overwhelmed by emotions that were triggered by a severely upsetting event or events, for this to count as a complete defence in cases of violent crimes like murder, as expressed in “...Courts should bear in mind that the phenomenon of sane people temporarily losing cognitive control, due to a combination of emotional stress and provocation, resulting in automatic behaviour, is rare.”<sup>23</sup> The fact that automatism is a complete excuse,<sup>24</sup> makes the defence controversial and viewed with scepticism by courts. Hence the judgement: “Thus, as remarked earlier, defences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question.”<sup>25</sup>

A reason the topic is so controversial seems to stem from the vexing jurisprudential issue of accountability, and perhaps even retribution. Automatism may be a complete defence in South African law (*Snyman*, 2008: 56–57 see also *S v Eadie* and *S v Henry* at footnote 24 above) and elsewhere (*Arboleda-Flórez*, 2002). This is so because, “It is trite law that a cognitive or voluntary act is an essential element of criminal responsibility.”<sup>26</sup> For being such, automatism is regarded with scepticism by South African courts (*Snyman*, 2008: 56–57) and as suggested in the verdict by Navsa JA that this behaviour would be rare. His call for judgement in terms of an automatism, does not address the lack of general agreement about what that would mean. In the legal profession, themes are similar to those we have mentioned in the previous section. In the much quoted *R v Charlson*, Judge Barry said, “If he did not know what he was doing [cf. and absence of knowledge], if his actions were purely automatic and his mind had no control over the movement of his limbs [cf. no control], if he was in the same position as a person in an epileptic fit [which may include all the mentioned themes] and no responsibility rests on him at all, then the proper verdict is “not guilty” of all the three charges.”<sup>27</sup> The same themes present also in another much quoted case, *R v K* where, “Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done.”<sup>28</sup>

Unconscious, as used in *R v K* means mental obfuscation. However, according to *Yeo* (2001, 2002) the issue in automatism is not whether

<sup>22</sup> *S v Eadie* supra paragraph 61.

<sup>23</sup> *S v Eadie* supra at paragraph 65.

<sup>24</sup> *S v Eadie* supra at paragraph 34, and *S v Henry* above at paragraph 14.

<sup>25</sup> *R v H* 1962 (1) SA 197 (A) at pg. 208. H’s defence was to the effect that he was so much under the influence of alcohol that he was in a state of automatism. His appeal failed.

<sup>26</sup> *S v Henry* supra at paragraph 14.

<sup>27</sup> *R v Charlson*, 1 All E.R. 864 (1955) quoted in the South African case, *S v Mahlinza* 1967 (1) SA 408 (A). Mahlinza was charged with murder and attempted murder of her children. She was found not guilty by reason of insanity in what is today the Supreme Court of Appeal.

<sup>28</sup> *R v K* supra.

<sup>19</sup> See footnote 11 above.

<sup>20</sup> See footnote 11 above.

<sup>21</sup> See footnote 11 above.



the person is unconscious, but whether he or she is able to control his behaviour. Similarly in a recent landmark Canadian case, *R v Stone*, where unconsciousness has also not been considered to be a key requirement for automatism. Judge Bastarache, speaking for the majority of the panel of judges said, “Furthermore, lack of voluntariness, rather than consciousness, is the key legal element of automatism”.<sup>29</sup> This judgement captures a property—involuntariness—common to the behaviour that underpins all the conceptualisations of automatisms above, unlike the other contested properties attributed to automatisms. If correct, involuntariness is a key specification of the behaviour that underpins NPCI. We will consider this further below in relation to behavioural theory.

### 3.2. Non-attribution to mental disorder invokes challenges to psychiatric testimony

In a defence of NPCI, psychiatrists in South Africa are called upon to give testimony about the absence of a mental illness or mental defect. The challenge in excluding a mental disorder is that the very item to be excluded has been elusive to a clear definition owing to the complexity of the concept (Fulford & Van Staden, 2013). Mental illness is accordingly not defined in the Criminal Procedure Act, 1977 and South African courts have been steering away from giving a definition of mental illness. This is for example reflected in a statement by the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, who stated, “...it is unnecessary, and undesirable to attempt a definition of the concept, insanity,” (Rumpff, Van Wyk, Gericke, Van Der Merwe and Allen, 1967: 50).

When South African psychiatrists usually make a diagnosis of mental disorder, they do so according to the criteria of the *American Psychiatric Association* (2013), for example the DSM 5, or the ICD-10 criteria of *World Health Organisation* (1992). A mental disorder diagnosed by such criteria, however, may not necessarily be regarded as a mental disorder or mental defect by courts, and may not even be grounds for mitigating circumstances. This is the case for example for the diagnosis of paedophilia.<sup>30</sup> On the other hand, there are many examples of involuntary behaviour that is not considered as a mental disorder or mental defect in South African criminal law, including for example epilepsy and post-ictal confusion,<sup>31</sup> and the cognitive deficiencies caused by head injury.<sup>32</sup>

The cause for an automatism may be thought of as decisive. There are many causes of automatism. Mental disorder, epilepsy (Moore & Puri, 2012), head injury (Ahmed, Bierley, Sheikh, & Date, 2000), dissociation (Fenwick, 1990) and sleepwalking (Snyman, 2008: 55–56) are well-known causes. Based on the causal attribution, automatisms that are not attributed to a mental illness or defect have been variously called sane automatisms (see for example *S v Eadie*<sup>33</sup>), non-insane automatisms (Briscoe et al., 1993: 56–59), and automatisms “attributable to a cause other than mental pathology”.<sup>34</sup> The distinction between sane and insane automatism is far from clear cut, however. Epilepsy, dissociation, head injury, and sleepwalking are often, but not necessarily, intricately associated with a mental disorder, depending on what one's definition of mental disorder is. For example, the diagnostic classifications make provisions for mental disorders caused by epilepsy and head injury. One may also argue that an automatism caused by epilepsy or brain injury is by its nature necessarily “mental” and “disordered” when it involves a behavioural disturbance, for such is the logical necessity embedded in the concept of a behaviour disturbance. This view

adopts (contentiously) a notion of a mental disorder that is broader than that captured by the diagnostic classification systems.

That the behaviour should not be attributed to a mental disorder, poses a further conceptual and clinical judgement problem for the psychiatrist. When violent behaviour is attributed to a mental disorder as ordinarily conceptualised in the diagnostic classification systems, it poses apparently less conceptual difficulty, for then the behaviour may be explained in terms of the symptomatology of a mental illness, and as a manifestation of such an illness. The critical question, formulated in the Criminal Procedure Act is whether there is a causal connection between the alleged offence (i.e., behaviour) and a mental disorder, but without requiring much clarity about specifically the behaviour other than it being a manifestation of a mental illness. In other words, the property of the behaviour that is crucial in the psychiatrist's assessment is whether that behaviour is causally connected to a mental disorder. The other properties of the behaviour, for example whether involuntary, are of implicit importance and/or presumed by virtue of the mental disorder.

However, when the offending behaviour (or the alleged offence) is not attributed to a mental disorder, the defining characteristics of the behaviour change—the crucial question changes. The properties of the behaviour, other than the property of being a manifestation of a mental illness, become crucial in the identification of the behaviour. One may even say the behaviour then comes from another domain altogether. Small wonder that some psychiatrists in South Africa respond by refusing to give expert testimony on the behaviour, because, so they argue, if the behaviour is not attributed to mental disorder, then testifying on such behaviour would fall outside the scope of their psychiatric expertise. The courts, nonetheless, often expect psychiatrists to give testimony, no less to rule out behaviour being caused by mental disorder. Going further than that by giving psychiatric testimony also on the behaviour (when not attributed to mental disorder), requires conceptual clarity about which behaviour underpins NPCI.

## 4. Toward clarity on the behaviour in giving psychiatric testimony

As we have considered above, jurisprudential concerns as point of departure would principally pursue the interests of establishing accountability. Psychiatrically, as we considered it above, one may expect that the point of departure and interest would be about the causal attributions and (the lack of) a mental disorder. Notwithstanding the merits for these interests, we propose that distinct to these interests the underpinning behaviour is first brought into focus and clarified both theoretically and in the psychiatric assessment and testimony—that is, prior to and distinct from the jurisprudential concern with accountability and the psychiatric concern with (non-) attribution to mental disorder.

A reason for focusing on behaviour first, we contend, is that psychiatric testimony is aptly within professional scope more so when in terms of behaviour than in terms of an automatism as defined by courts for purposes of judgement on accountability, even more so considering the inconclusive state of affairs on what constitute an automatism (as described above). Furthermore, psychiatric assessment and testimony about the behaviour distinct from a clinical judgement on whether that behaviour is causally attributed to a mental disorder (or not), helps to avert a conflation (and potential confusion) between the behaviour under assessment and the challenges in making a judgement that the behaviour is not attributed to a mental disorder.

### 4.1. Testimony informed by behavioural analysis

In addressing the question on which behaviour underpins NPCI, we thus set aside at first the requirement that the behaviour should not be attributed to a mental disorder. Once the behaviour is clarified through a process of progressive specification of the behaviour, the specification of being non-pathological may be added but should be

<sup>29</sup> *R v Stone* supra at paragraph 224.

<sup>30</sup> *S v Madiakotla* (440/87) [1988] ZASCA 49 (17 May 1988). Retrieved 2015, 03 June, from <http://www.saflii.org/za/cases/ZASCA/1988/49.html>.

<sup>31</sup> *R v Mkize* 1959 (2) SA 260 (N).

<sup>32</sup> *S v Wiid* supra.

<sup>33</sup> *S v Eadie* supra at paragraph 14.

<sup>34</sup> *S v Henry* above at paragraph 19.

maintained conceptually and clinically distinct from the behaviour itself.

So qualified, the question on which behaviour underpins NPCI is guided here by a functional analysis as is well-established in behaviour therapy. The clinical assessment of candidate behaviour in a particular court case may follow suit by which psychiatric testimony would be based on embedded expertise in behavioural theory.

Behavioural theory (Martin & Pear, 2015), which is well-established in psychiatric theory and practise, may contribute to attain clarity conceptually and clinically. Behavioural theory situates behaviour in a chain of chronological events whereby the behaviour is distinguished from antecedents and consequences. The antecedents to behaviour include the final stimulus or trigger for the behaviour. The consequences of the behaviour may in turn also be stimuli to further behaviours, and they may impact on the behaviour through a feedback loop in the chain of events.

Regarding the behaviour itself, behavioural theory provides for the assessment of a specific behaviour in terms of its topography, intensity, latency, duration, frequency, and sometimes quality (Martin & Pear, 2015: 201–213). The topography of behaviour refers to the form of movement. Say a trained boxer accurately, and with great force, notices an opening in his opponent's defence (i.e., the antecedent event or trigger) and he then punches his opponent on the jaw with the effect of his opponent staggering backwards (i.e., the consequence). The form of his arm movement may for example be in a straight line or an arc (Martin & Pear, 2015: 201). When repetitive, behaviour has a frequency. In the case of the boxer, frequency refers to how often he punches his opponent in given time period (Martin & Pear, 2015: 201). Duration refers to the time it takes from the inception of the (arm) movement until it ends (Martin & Pear, 2015: 206). Latency refers to the time between the occurrence of a stimulus and the onset of behaviour (Martin & Pear, 2015: 208). In the boxer's case it may be the time it takes between the start of noticing an opening (the stimulus) and moving his arm. The intensity of behaviour is the force or magnitude with which a specific behaviour is performed (Martin & Pear, 2015: 207). In the case of the boxer the punch is of enough force for his opponent to stagger backwards. The quality of behaviour refers to an evaluation of the behaviour by an observer who gives his or her impression of how well the movement has been performed (Martin & Pear, 2015: 208). In the boxer's case, the skilfulness of the punch as judged by boxing judges and whether this particular kind of punch is permissible during a boxing match refers to the qualitative aspect.

Behaviour theory's articulation in terms of antecedents and consequences of behaviour is useful to specify the behaviour that underpins NPCI. From the preceding sections, we take it that the antecedent that specifies and triggers the behaviour underpinning NPCI is a set of negative and overwhelming emotions. The consequence that specifies the behaviour underpinning NPCI, is actual or potential physical damage or physical injury by virtue of which we speak of *violent* behaviour. That consequence in violent behaviour is not necessarily actual physical damage or injury, but potentially such as is illustrated in the following: Say X takes a knife and stabs at Y, the behaviour of X is still violent even if he misses Y. Whether the behaviour is specified as violent, furthermore, neither depends on whether the damage or injury was intended. If, X is delirious and in a confused manner randomly stabs about with a knife but Y is not injured because Y has side-stepped, we may also speak of violent behaviour even though there is no intention to stab Y.

Whether violent behaviour is intended or unintended, behaviour theory has it that the consequences may have effects on further behaviour. Two consequences are of particular relevance here: The first is that the violent behaviour may be reinforced with the effect that it continues (Martin & Pear, 2015: 32–39, 121–125, 140–149). An example is where violent behaviour continues because it is experienced as gratifying (e.g. in sadism or revenge). This means each consecutive observation of a victim's pain or fear response or even the effect of the body being injured is a stimulus (or antecedent) for repeating a violent act. The

second consequence may be that the violent behaviour is inhibited (or "punished" as used in behaviour theory) with the effect that it discontinues (Martin & Pear, 2015: 22–29; 121–125, 140–149). An example is when emotional distress in the perpetrator (for example: horror, disgust, fear) is invoked by observing a victim's pain or fear, or the effect of bodily injury to the effect that the behaviour discontinues.

Through behaviour theory, the behaviour that underpins NPCI has been qualified as emotionally triggered violent behaviour. If Judge Bastarache's panel is correct (see above),<sup>28</sup> the behaviour underpinning NPCI can be specified further as involuntary. Involuntariness may be difficult to assess practically, but such purpose may also be informed by behavioural theory. The illuminating questions are which topography, intensity, latency, duration, frequency, and quality of behaviour correspond with involuntariness.

#### 4.2. Illustrating behavioural analysis by using a case

To illustrate how a behaviour analysis as set out above may be useful, we use the case of *S v Smith*, in which the defence argued for NPCI.<sup>35</sup> Ms. Smith fell in love with Mr. Theron, a married man 19 years older than she. Mr. Theron repeatedly (but in retrospect with duplicity) professed his love for her and said that he would leave his wife to marry her. While nothing came from Theron's promises, Ms. Smith found herself so attracted to Mr. Theron that she simply could not cease their relationship. As their relationship continued, Ms. Smith in fact gave up much of what was important to her for him, including her studies.

One day Ms. Smith and Mr. Theron visited a mutual friend at the friend's house. They went together in Mr. Theron's motor vehicle. A while after they had arrived, Mrs. Theron appeared, much to Ms. Smith's surprise. The purpose of Mrs. Theron's presence, presumably with the foreknowledge of Mr. Theron, was to attempt to get Ms. Smith to discontinue her relationship with Mr. Theron. Using abusive language, Mrs. Theron told Ms. Smith that she and her husband had reconciled and that Ms. Smith should stay out of their lives. Then Mr. and Mrs. Theron made a point of embracing and kissing each other in Smith's presence, presumable to show Ms. Smith how committed they were to each other. After this display, Ms. Smith asked Mr. Theron to take her (Ms. Smith) back to her home, presumable with both herself and Mr. Theron driving away together in Mr. Theron's vehicle. However, Mr. and Mrs. Theron left the house and went to Mr. Theron's motor vehicle. Ms. Smith at first had stayed behind, because she had wanted to talk things over with Mr. Theron. However, Mr. Theron told the friend to inform Ms. Smith that he was not going to do so. Furthermore, he had Ms. Smith informed that she should come and get into his motor vehicle or else walk home. Ms. Smith then also went outside to Mr. Theron's vehicle.

Once outside, Ms. Smith found Mr. Theron again embracing and kissing his wife. At that time Smith unzipped her handbag, removed a handgun and shouted, "I will kill him and go to jail for him." Then she fired 3 shots in rapid succession at Mr. Theron, who by that time had turned and attempted to flee. One of the shots eventually caused his death. After having fired the shots, Ms. Smith drove off in Mr. Theron's vehicle. At that time Ms. Smith did not realise that she had fatally wounded Mr. Theron. She only later discovered that Mr. Theron had been killed and then she reported at a police station.

Ms. Smith later claimed that she had no recollection of what had happened, except for having heard two bangs. The defence claimed criminal incapacity due to "extreme emotional distress". However, Ms. Smith was convicted of murder in the High Court. The conviction was upheld by the SCA, but her sentence was reduced from 6 to 3 year imprisonment, because the SCA considered the case as having "special circumstances", making 6 years imprisonment "unduly harsh".

<sup>35</sup> *S v Smith* (1) SACR (A) 130 (1990).

We may apply a behaviour analysis to the case of *S v Smith* as follows: The final straw, or triggering event (which some may call the emotional blow), in a series of emotional upsets and humiliations was when her lover embraced and kissed his wife (again) at his vehicle. Smith was very upset at the time. The antecedent (stimulus or trigger) was a humiliating event (at least in local culture). The latency between the triggering event and the firing of the shots was not stated, but it is reasonable to infer that it was no longer than a few seconds, allowing her to unzip the handbag, find and remove the gun, arm it, point it and squeeze the trigger. Similarly, the duration may be inferred as lasting no longer than about 3 seconds to fire 3 shots in rapid succession. The topography of the behaviour involves pointing a gun at a fleeing victim. The force of the behaviour was that of squeezing a trigger. The quality of the behaviour can be described as accurate enough to hit a fleeing victim. In this case the consequences of the behaviour were hitting the victim, but it is unclear from the case whether the perpetrator noticed it.

The behavioural analysis also points to potentially illuminating questions, even if all answers may not be so clear in this case: The triggering event was humiliation, but was it sufficient to potentially trigger such intensely negative emotions to overwhelm and incapacitate the ability to behave voluntarily? If so, is the behaviour itself consistently involuntary? The latency may be a helpful property to consider, referring to the period from the “final straw” until Smith squeezed the trigger for the first time. Too long a period (for example) may defy a claim that the behaviour was involuntary. Similarly for the time it took to complete the violent behaviour (i.e., the duration). Regarding the topography and the quality of the behaviour, the skill and precision of the behaviour may be telling about its involuntariness. The intensity of the behaviour in this case is unlikely to be informative, for it simply entailed lifting an arm and squeezing a trigger, unless for example, the firearm is particularly difficult to arm or had failed to fire at first.

The behaviour (whether a physical or a mental act) that was performed in preparation of the violent behaviour should also be considered as to whether its properties match with involuntariness. In this case, a question is whether Smith's unzipping of her handbag, finding the gun, removing and arming it are all involuntary behaviours. What does the verbal utterance that she will “kill him and go to jail for him” tell about the voluntariness of these preparatory behaviours?

#### 4.3. (Not) attributing the behaviour to mental disorder

The behaviour that underpins NPCI has been specified above as emotionally triggered involuntary violent behaviour. A focus on the behaviour differentiates the emotionally triggered involuntary violent behaviour from its potential causal attributions—both conceptually and practically. The behaviour and/or the extreme negative emotions in emotionally triggered involuntary violent behaviour may be attributed causally to a mental disorder, but neither need to be caused so. They may be attributed causally to epilepsy, or a psychoactive substance or any of the causes of automatisms, but again neither need to be so caused.

Whether these causal attributions pertain, is a consideration that is conceptually and clinically distinct from whether candidate behaviour (in an alleged offence) conforms to emotionally triggered involuntary violent behaviour. Accordingly, psychiatric assessment and testimony may be articulated (as far as information and other contingent constraints may allow) in terms of the violent behaviour and its properties as informed by behavioural theory; whether the violent behaviour was involuntary; whether the accused experienced extreme negative emotions; whether the extreme negative emotions were indeed triggered by an upsetting event; whether the upsetting event, the extreme negative emotions, and the involuntary behaviour are causally connected; and whether that behaviour is attributed (or not) to a mental disorder, a psychoactive substance, epilepsy or any other cause.

## 5. Conclusions

In the interest of sound psychiatric testimony and consequently good jurisprudence, some steps toward clarity have been suggested to address the confusing issues in non-pathological criminal incapacity and automatism. Clarity has been gained by recognising the confusing and even conflicting issues, and we have suggested that behaviour and its qualities should be brought into focus distinct from whether it is (not) causally attributed to a mental disorder; and considered distinct from jurisprudential considerations of accountability. Clarity on the behaviour can then be gained by specifying it in terms of its crucial features as informed by behavioural theory. We have identified two common features for this specification from descriptions of automatisms relevant in NPCI: involuntariness and triggering extreme negative emotions. Accordingly, “emotionally triggered involuntary violent behaviour” is a construct posed for unpacking in further conceptual work, and investigation of its practical and reliable application. The construct denotes a particular kind of behaviour that may be conceptualised and assessed distinctly from whether it is causally attributed to a mental disorder (or not); as well as from meeting criteria for an automatism as defined by courts for purposes of judgement on accountability.

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